Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Market Entry and Regulation of Foreign-Affiliated Entities	)	IB Docket No. 95-22
	)	RM-8355
	)	RM-8392

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COMMENTS OF
LDDS COMMUNICATIONS, INC.

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COMMENTS OF
LDDS COMMUNICATIONS, INC.

LDDS Communications, Inc. ("LDDS") hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") released February 17, 1995 in the above-captioned proceeding. LDDS fully supports the basic goals underlying the NPRM. However, LDDS does not agree with the Commission's proposed means for achieving those goals. LDDS believes that the best means to achieve these goals is not for the U.S. to restrict access to the U.S. market, but for the U.S. to lead by example by opening up its market.

A. Summary

LDDS believes that the U.S. telecommunications market should be open to competition, without entry restrictions. Any movement by the U.S. government to erect additional entry barriers to foreign carrier entry into the U.S. market, or to foreign carrier investment in U.S. carriers, may well backfire, and result in foreign markets being closed to U.S. carriers and investment. It is a problematic undertaking for the U.S. government to use its own regulatory policies as a means of imposing pressure upon foreign countries to make their telecommunications markets more open to U.S. carriers. The U.S. should continue to lead by example, and to promote competition whenever possible.

Regulatory barriers to foreign carrier investment in U.S. carriers will impair effective competition within the U.S., to the detriment of U.S. business and U.S. consumers. Apart from AT&T, most, if not all, U.S. carriers require financing outside of the traditional financial markets to expand their networks and service offerings. Foreign telecommunications entities are a crucial source of such capital, and the U.S. government must not take any action that will unreasonably deny U.S. carriers access to such capital.

If, however, the FCC ultimately determines that the benefits of restricting foreign carrier entry outweigh the costs in certain circumstances, LDDS strongly encourages the Commission to adopt a 25% black-line threshold. Aggregate foreign carrier investment up to 25% would not require prior Commission authorization, and could proceed without delay. If the investment were 10% or greater, notification to the FCC would be required, comprehensive non-discrimination provisions would apply, and dominant carrier regulations would be applied if the foreign carrier investor has market power in its home market(s). Foreign carrier investment in excess of 25% in an international facilities-based U.S. carrier would be subject to the existing market entry standards already applied by the Commission. By establishing a 25% black-line threshold, the Commission would facilitate foreign investment in <u>U.S.</u> carriers, while limiting <u>foreign</u> carrier entry into the U.S. market until the <u>foreign</u> carrier's market, examined as a whole, was determined to be sufficiently open to entry by U.S. carriers.

B. The NPRM

In its NPRM, the Commission proposes to adopt an "effective market access" test in evaluating whether foreign-affiliated carriers should be permitted to enter the U.S. international facilities-based services market. NPRM at ¶ 38. The Commission proposes to define "effective market access" as "the ability for U.S. carriers, either currently or in the near future, to provide basic, international telecommunications facilities-based services in the primary markets served by the foreign carrier seeking entry." Id. at ¶ 40. In addition to evaluating "effective market access," the Commission proposes to consider other factors which it has previously examined, such as the openness of other telecommunications segments of the foreign carrier's market and the ability and incentive of the foreign carrier to discriminate against unaffiliated U.S. carriers. Id. at ¶¶ 38, 45. The Commission proposes to apply the "effective market access" test to applications by foreign-affiliated carriers to provide facilities-based international services.

Even if the foreign-affiliated carrier meets the "effective market access" test, the FCC still proposes to assess a host of other factors before authorizing entry to the U.S. market. Id. at ¶ 45. Conversely, even if a foreign carrier cannot meet the "effective market access" test, the FCC proposes that a foreign carrier may still be authorized to enter the U.S. market if "other public interest factors warrant its entry ...." Id. at ¶ 49.

Currently, the Commission applies a case-by-case review to foreign carrier applications. The Commission asserts that such review "has caused uncertainty in the market due to the lack of a clear standard for evaluating applications by foreign carriers with different degrees of market power in their home markets." Id. at ¶ 23. The Commission believes that "[a] formal rulemaking ... would give foreign entities more certainty when making investment decisions ...." Id. at ¶ 25.

The FCC has asked for comment on what level of foreign ownership would trigger the proposed entry standards. In determining whether a carrier is "foreign-affiliated," the FCC has asked for comment on whether the threshold should be 10%, 25%, or a "controlling" interest. Id. at ¶¶ 52, 59 and 60.

C. Background

LDDS, which recently completed the acquisitions of IDB Communications Group, Inc. ("IDB") and WilTel, is the fourth largest provider of interexchange telephone services in the U.S. LDDS is facilities-based for most domestic and international services.

Alone among the five largest IXCs, LDDS does not have an immediate material interest in the outcome of this proceeding. No foreign entity, whether a carrier or otherwise, owns more than one percent of LDDS. At the same time, LDDS has only insubstantial interests in overseas entities, and LDDS is not part of any global partnership.1/ By contrast, MCI (the second largest carrier) is 20% owned by British Telecommunications; Sprint (the third largest carrier) has on file an application seeking authority for an aggregate of 20% foreign investment by Deutsche Telekom and France Telecom, and Cable & Wireless, Inc. (the fifth largest carrier) is 100% owned by its United Kingdom parent. Although AT&T has received little or no foreign investment, AT&T has made

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1/ LDDS ultimately owns 100% of WorldCom Europe, which currently operates in the United Kingdom and Germany. WorldCom Europe accounts for less than 2% of LDDS's annual revenues. In addition, LDDS is a 50/50 joint venture partner with Teleglobe, Inc., a Canadian carrier, in IDB Mobile Communications, Inc., a U.S. provider of international mobile satellite services. IDB Mobile accounts for less than 1% of LDDS's annual revenues.

sizeable overseas investments, including a substantial equity investment in Uniworld, its joint venture with Unisource, and AT&T has entered into far-reaching "co-marketing" arrangements with foreign carriers through both Unisource and WorldPartners.

D. The FCC Should Not Restrict Access To The U.S. Market

The FCC emphasized that it has three basic goals in the rulemaking proceeding: (i) to promote effective competition in the global market for communications services; (ii) to prevent anticompetitive conduct in the provision of international services or facilities; and (iii) to encourage foreign governments to open their communications markets. Id. at ¶ 26. Further, the FCC asserted that "[t]he promotion of effective competition in the global market is our primary goal." Id. at ¶ 27.

LDDS fully supports the Commission's three goals, and agrees that the promotion of effective competition should be the primary goal. LDDS believes, however, that the best means to achieve these goals is not for the U.S. to restrict access to the U.S. market, but for the U.S. to lead by example by opening up its market.

The single most successful U.S. telecommunications policy in recent memory has been the policy of promoting the maximum feasible competition in the United States and abroad. The benefits of competition are quite real and will continue to accelerate in the coming years. Competition ensures, among other things, lower prices, better and more diverse service offerings, technological innovation, and market-driven infrastructure development. The beneficiaries are U.S. consumers, and U.S. businesses who are competing in domestic and global markets. This pro-competition policy should be the cornerstone of the Commission's international telecommunications policy.

Conversely, the Commission should not adopt any policies that would impose limitations upon consumers or restrict the ability of carriers to provide services in response to market demand. Such proposals, including the Commission's "effective market access" test, impose obvious hardships upon U.S. consumers by interfering with the free interplay of market forces.

AT&T, the leading (and perhaps only) proponent of restrictive international services entry policies, seeks to limit competition to protect its own entrenched market position. In LDDS's view, AT&T's Request for Rulemaking, which led to the NPRM, advocated policies that do not protect U.S. interests, but rather are designed to deprive AT&T's competitors of the opportunity to obtain critical capital investment from foreign carriers. AT&T, which generated $4.7 billion in after-tax profits in 1994, does not require financing outside of the traditional financial markets to expand its network and service offerings. By contrast, AT&T's key competitors have had to tap other sources of capital in order to implement the expansion and improvement of their networks. As evidenced by past foreign investment in IDB, current foreign investment in MCI, and proposed future foreign investment in Sprint, foreign telecommunications entities are an important source of capital to U.S. carriers.

The FCC's primary goal is to promote effective competition in the global market for communications services. LDDS submits that the best way to achieve that goal is to allow open entry to the U.S. market. Such entry will provide U.S. carriers with ready access to foreign capital, which, in turn, will enable these carriers to maintain their competitiveness not only in the U.S., but overseas as well.

The FCC's second goal is to prevent anticompetitive conduct in the provision of international services and facilities. LDDS fully agrees that the FCC must continue to monitor carefully the involvement of foreign carriers in the U.S. (as well as U.S. carriers with interests in overseas telecommunications carriers with market power) to ensure that foreign investment does not result in anticompetitive activities. Such anticompetitive conduct must be monitored not only in the context of equity investments, but also in the context of "co-marketing" or "partnership" arrangements, where the foreign carriers may have just as much incentive to favor their U.S. carrier partner.

The FCC already has in place the necessary regulatory tools, and remedies, to monitor, and prevent, anticompetitive conduct by dominant foreign carriers against unaffiliated U.S. carriers. In a series of decisions on foreign carrier entry, the FCC has established comprehensive safeguards to prevent discriminatory conduct. LDDS proposes that those safeguards be codified by the FCC in this proceeding and applied to foreign carrier investments of 10% or more. Unlike the restrictive "effective market access" test, the non-discrimination safeguards are appropriate, narrowly-tailored measures designed specifically to prevent anti-competitive conduct. LDDS supports the continued application of these important safeguards.

The FCC's third goal is to encourage foreign governments to open their communications markets. LDDS seeks maximum opening of overseas markets, but LDDS does not believe that adopting restrictive, protectionist policies in the U.S. are the most effective means to achieve this goal.

LDDS is concerned that any movement to close the U.S. market to foreign carriers will redound to the detriment of U.S. carriers seeking to enter foreign markets. It is a problematic and risky undertaking for the FCC to use its own regulatory policies as a means of imposing pressure upon other foreign countries to make their telecommunications markets more open to U.S. carriers. With few exceptions, the countries which have significantly liberalized their markets (e.g. Canada, the U.K., New Zealand, Australia, Sweden and Chile) have done so on their own accord, after evaluating the success of a competitive telecommunications environment in the U.S. Few, if any, countries have increased the openness of their markets in response to the regulatory pressures exerted by another country. The U.S. should continue to lead by example and promote competition whenever possible. If the FCC were to erect entry barriers or impose service and facility restrictions at this point in time, the effect could well be to roll back the clock by encouraging other countries to retaliate by closing their markets to U.S. carriers.

The FCC must also recognize that the introduction of competition in foreign markets will usually occur in uneven increments (rather than on a flash-cut basis), one market segment at a time. However, our experience in the U.S. teaches that competition in one market segment inevitably works to erode limitations on competition in adjacent market segments through consumer and market forces. That explains how MCI was able to use its initial private line services as a wedge to enter the U.S. domestic and international switched services market, and why efforts to police the use of terminal equipment by end users have not been successful.

The FCC should encourage (or at least not inhibit) the replication of that same competitive process in other countries. Rather than using regulatory policy to try to force a foreign country to liberalize specific market segments (which may never happen), the FCC should encourage U.S. companies and start-up foreign companies to take maximum advantage of market opening opportunities when and as they occur in other countries. Trade negotiations and policies can be effective in creating new market opportunities, but they work best when actual market forces and consumer demand in foreign countries are imposing additional pressure upon artificial barriers to open markets.

Finally, LDDS submits that the erection of higher entry barriers by the adoption of additional rules and regulations is contrary to Administration and Congressional efforts to streamline, and eliminate, unnecessary regulations. The delay and uncertainty created by the consideration, adoption and implementation of new regulations will result in less competition, to the detriment of U.S. business and U.S. consumers. In addition, the increased regulatory burden upon U.S. carriers seeking foreign carrier investment cannot be justified by the supposed benefits of the Commission's proposed new policy.

E. The FCC Should Permit Foreign Carrier Investment Up To 25% Without Prior Authorization If It Ultimately Determines That Restrictions On Foreign Ownership Are Necessary To Serve The Public Interest

If the Commission ultimately determines that the benefits of restricting foreign carrier entry outweigh the costs in certain circumstances, LDDS strongly encourages the Commission to adopt a 25% black-line threshold. The 25% threshold would match the Section 310(b)(4) benchmark, thereby providing symmetry and ease of application. Under this approach, a U.S. carrier would be deemed to be a "foreign-affiliated carrier" if the aggregate investment by foreign carriers was 25% or more.

Adoption of the 25% threshold would accomplish most of the Commission's stated policy goals, while providing U.S. carriers with adequate flexibility to accept foreign carrier investment. By establishing a 25% threshold, the Commission would facilitate foreign investment in U.S. carriers, while limiting direct foreign carrier entry into the U.S. market until the foreign carrier's market, examined as a whole, was sufficiently open to entry by U.S. carriers. Further, a black-line threshold will create certainty and reduce delay.

LDDS submits that the 25% threshold should be implemented as follows. If one or more foreign carriers propose to invest an aggregate of less than 25% in a U.S. carrier, no prior FCC authorization would be required. Therefore, U.S. carriers would be able to accept up to 25% foreign carrier investment without delay or uncertainty.

The Commission has expressed concern that its current case-by-case review "has caused uncertainty in the market ..." and stated that the rulemaking "would give foreign entities more certainty when making investment decisions ...." Id. at ¶¶ 23, 25. LDDS submits that the addition of an "effective market access" test will increase uncertainty because there is no established precedent to rely on in determining whether the foreign carrier's home market offers "effective market access." Further, the "effective market access" test will not replace, but simply be added onto, the numerous other factors the Commission already considers in evaluating proposed foreign carrier investment. Application of the proposed new rules, just like the existing rules, necessarily will have to be on a "case-by-case" ("country-by-country") basis. This is particularly true since the Commission has proposed that the "effective market access" test not be dispositive. Id. at ¶¶ 45, 49. LDDS fails to see how the proposed new rules will add certainty to the process.

If the FCC truly seeks to add certainty, and reduce delay, the adoption of a clear and simple 25% threshold, without exceptions, will accomplish this. The FCC has proposed, however, that even if the proposed level of foreign carrier investment is below the adopted threshold, the FCC will still be able to review the transaction in certain circumstances. Id. at ¶ 64. LDDS submits that any exception to the rule will defeat the very purpose of having a clear rule. If third parties can delay foreign investment that falls below the threshold, there will be no certainty. If the FCC believes that it is absolutely necessary to be able to review below-the-threshold foreign carrier investment in as-yet undefined "special circumstances," it is imperative that the FCC commit itself to reaching a final determination within six months of the date the notification was filed. Otherwise, third parties will invariably use the process to create interminable delay.

In order to monitor potential discrimination by foreign carriers against unaffiliated U.S. carriers, the Commission should require that it be notified if aggregate foreign carrier investment is 10% or more. In such cases, standard non-discrimination safeguards would automatically be applied. As noted earlier, in a series of decisions on foreign carrier entry, the FCC has established comprehensive safeguards to prevent discriminatory conduct. LDDS proposes that those safeguards be codified in this proceeding and applied to foreign carrier investments of 10% or more. In addition, the U.S. carrier would be deemed dominant for service to its foreign investor's home market(s) if its foreign carrier investor has market power in its home market(s).

F. Conclusion

LDDS believes that the U.S. telecommunications market should be open to competition, without entry restrictions. If, however, the FCC ultimately determines that the benefits of restricting foreign carrier entry outweigh the costs in certain circumstances, the FCC should permit aggregate foreign carrier investment up to 25% without prior authorization. By establishing a 25% black-line threshold, the Commission would facilitate foreign investment in U.S. carriers, while limiting direct foreign carrier entry into the U.S. market.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susanne Deljoubar, hereby certify that I have this 11th day of April, 1995 sent a copy of the foregoing "Comments of LDDS Communications, Inc." by first-class U.S. mail, postage prepaid to the following:

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